



REPUBLIC OF KENYA

High Court at Malindi

Election Petition 12 of 2013

ABOUB ALIPETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ADHAN NURI BERHE.....2ND RESPONDENT

AND

SHARIF ATHMAN ALI.....3RD RESPONDENT

RULING

Introduction

1. In the 4th March 2013 General Elections, the 3rd Respondent was declared by the 2nd Respondent, the Returning Officer of Lamu East constituency, to be the duly elected member of the National Assembly for the said electoral area. On 8th April 2013, the Petitioner **ABOUB ALI**, who claims to be a registered voter in Lamu East constituency, filed a petition against The Independent Electoral and Boundaries Commission as the 1st Respondent and Adan Nuri Berhe, the Returning Officer as the 2nd Respondent, seeking the following prayers:

“(a) The Honourable Election Court determine and declare which candidate was validly elected on 4th March 2013 in the election for member of the National Assembly for Lamu East Constituency upon a recount and or examination of votes cast.

(b) Such other or further order(s) that may be legally necessary and consequential upon the determination by the Honourable Election Court herein as to which candidate was validly elected on 4th March 2013 in the election for the member of the National Assembly for Lamu East Constituency.”

2. Service was duly effected upon the 1st and 2nd Respondents on 18th March 2013 and 24th April 2013 respectively. This is evidenced by the affidavits of service filed in court on 19th April 2013 and 25th April 2013. Curiously, the Petitioner did not sue the person who was declared to have been duly elected as the

member of the National Assembly for Lamu East Constituency. In his petition, specifically paragraph 20(e), the Petitioner averred that he had no complaint against any of the candidates in the election for member of the National Assembly for Lamu East Constituency. Presumably, this included the winning candidate.

3. The 1st and 2nd Respondents entered their appearance on 8th May 2013 and consequently thereafter filed their response to the petition dated 6th May 2013 on the same date.

4. The petition was fixed for pre-trial conference by this court on 16th May 2013.

5. On the said date, **SHARIFF ATHMAN ALI**, the candidate who was declared to have been duly elected as the member of the National Assembly for Lamu East Constituency sought the leave of the court to be enjoined in the proceedings for the purposes of prosecuting an application in which he sought to have the petition struck out on, *inter alia*, the ground that the petition was fatally defective because he had not been enjoined as a party to the petition. Having heard the application by the sitting member of the National Assembly, and there being no objection from either the Petitioner or the 1st and 2nd Respondents, this court allowed the application by Shariff Athman Ali to be enjoined in the suit. He was enjoined as the 3rd Respondent for the purpose of prosecuting the application.

6. The parties to the petition indicated to the court that they had various applications which they desired to file for consideration by the court. The court ordered the said parties to file their respective applications, and thereafter serve them upon their opponents within a specified period so that the court would be in a position to issue further directions in regard to how the said applications would be disposed of. The court fixed the hearing of the intended applications tentatively for the 22nd May 2013. On that date, upon perusing the applications, this court determined that the application by the 3rd Respondent which sought to strike out petition ought to be given priority in light of the weighty legal issues that the said application raised.

Application to strike out petition

7. The 3rd Respondent's application is a Notice of Motion made under **Order 2 Rule 15(1)** of the **Civil Procedure Rules** and **Rules 2,4 and 5** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013** (*hereinafter referred to as the Election Petition Rules*) seeking to strike out the petition. The 3rd Respondent further prayed that the Petitioner be ordered to pay the costs of the application and the costs of the petition. The grounds in support of the application are on the face of the application. The 3rd Respondent contends that the petition is incompetent because it failed to include the 3rd Respondent as a party thereto. The 3rd Respondent states that the petition is without merit as it fails to raise any single allegation of a commission of an electoral offence, malpractice and or irregularities. The 3rd Respondent further contends that the petition is without legal basis because the Petitioner had not made any claim challenging the process of the election and the outcome thereof. The 3rd Respondent further states that the Petitioner had not established any prejudice that he had suffered as a result of the process and the outcome of the said elections. The application was supported by the annexed affidavit of the 3rd Respondent.

8. The Respondents did not file any pleadings in opposition to the application. However, Mr. Muturi Mwangi for the Petitioner and Mr. Wetangula for the 1st and 2nd Respondents informed the court that they would respond orally in court to the application. This court granted the said counsel leave to make their oral submission in opposition to the application. This court then proceeded to hear the application.

The 3rd Respondent's case

9. The 3rd Respondent's case is that the petition is incompetent for in the first place for failing to include the 3rd Respondent as a respondent thereto. The 3rd Respondent pointed out that **Section 2** of the **Election Petition Rules, 2013** provide that a respondent in relation to an election means, *inter alia*, a person whose election is being challenged in the election petition.

10. In interpreting the said provision, the 3rd Respondent submitted that a successful candidate must be made party to the petition. Failure to include the 3rd Respondent in the Petition in the first

instance rendered the petition incompetent. It was further submitted that the petition is seeking a declaration by the court as to which candidate won the election following a recount. Any proceedings in that regard in the 3rd Respondent's absence would prejudice him. In the circumstances, failure to enjoin the 3rd Respondent in the petition was therefore fatal.

11. Secondly, it was submitted by Mr. Abubakar for the 3rd Respondent that the petition is without merit as it fails to raise any allegation of an electoral offence, malpractice or irregularity on the part of the 1st and 2nd Respondents. Counsel for the 3rd Respondent explained that **Section 76** of the **Elections Act** gave the basis upon which an election petition is to be filed to challenge the validity of an election. He submitted that under **Section 76 (1)**, a petitioner questioning the validity of an election must point out the malpractices or an illegal conduct. In this regard, counsel for the 3rd Respondent urged the court to exercise its jurisdiction under **Section 79** of the **Elections Act** and summarily dismiss the petition.

12. Further, it was submitted by the 3rd Respondent that the Petitioner had not established that he had been aggrieved by the electoral process as he merely stated in his petition that he had a right to demand for a recount. According to the 3rd Respondent, under the provisions of **Regulation 80(2)** of **The Elections Act**, the right to request for a recount is only a reserve of the candidates or their agents. This right can only be exercised at the polling station. He submitted that the Petitioner was neither a candidate nor an agent but was only an elector as pleaded in the Petition. Therefore he had no *locus standi* to challenge the election of the 3rd Respondent on the basis that there ought to be a recount.

13. Thirdly, counsel for the 3rd Respondent submitted that in the circumstances of the petition therefore, the court had no jurisdiction to hear the petition: For the court to continue to hear the petition would be an exercise in futility.

14. Mr. Abubakar for the 3rd Respondent placed reliance on the case of **Jahazi –Vs- Cherongony [1984] KLR 814** where the court held that failure by Petitioner to personally sign the petition (under the previous Election Petition Rules) was fatal to the petition. The court held that the requirement that the Petitioner personally signs the petition was not a mere formality but was mandatory. He therefore submitted that the failure by the Petitioner to enjoin the 3rd Respondent in the first instance in the petition was not an irregularity which could be overlooked but rather was a mandatory requirement which went to the root of the jurisdiction of the court to hear the petition.

15. Mr. Wetangula for the 1st and 2nd Respondents associated himself with the submission made by the counsel for the 3rd Respondent. He explained that the purpose of any election petition is the challenge of the validity of the electoral process and consequently the election of the successful candidate. It was his submission that it is therefore mandatory that the successful candidate be made party to the petition. He pointed out that the law provides that the petition be filed and served within 28 days after publication of the results. The 3rd Respondent was not served with the same within the stated statutory period. This omission thereby rendered the petition incompetent.

The Petitioner's Response

16. In reply, Mr. Muturi, counsel for the Petitioner acknowledged in his submissions that the application related to alleged non-compliance with **Rule 2** of the **Election Petition Rules**. In interpreting the said rule, learned counsel for the petitioner submitted that the said rule only sought to define who may be a respondent in an election petition and did not lend itself to a mandatory requirement that a successful candidate be made a party to the petition.

17. The learned counsel for the Petitioner contended that it is only **Rule 9** of the **Election Petition Rules** which made it mandatory that the Independent Electoral and Boundaries Commission (IEBC) be a mandatory respondent in an election petition.

18. In addressing the issue of jurisdiction as urged by the 3rd Respondent, he submitted that the court did have power to order a recount if the Petitioner established a case for such recount to be undertaken.

19. Mr. Muturi observed that the Election Rules did allow for a single issue petition. He drew the court's attention to **Rule 32** of the **Election Petition Rules** which in his view did not require the petitioner to put forward any ground other than the one seeking an order for a recount. The Petitioner submitted that the issues raised in the application before court were issues of evidence which could not be determined in an interlocutory application. He urged the court not to grant the orders sought by the 3rd

Respondent because to do so would amount to this court rendering a decision on the merits of the petition without substantively hearing the issues in dispute.

20. It was the Petitioner's further submission that the electoral process is not concluded not until an election petition is heard and determined. He submitted that the petition had been presented by an elector and were the petition to be struck out, he would be denied his constitutional right to participate in the determination of who was rightfully elected as member of the National Assembly for Lamu East Constituency.

21. Mr. Muturi submitted that the Petitioner had in his petition established a prima facie case to enable this court order a recount as provided under **Section 82** of the **Elections Act** and **Rule 32** of the **Elections Petition Rules**. He submitted that for the purposes of this petition, the sitting member of National Assembly was a busybody and had no *locus standi* to be a party to the petition.

3rd Respondent's rejoinder

22. In a rejoinder, the learned counsel for the 3rd Respondent submitted that **Rule 9** of the **Election Petition Rules** was included in the Rules in light of the past history when election petitions were filed and excluded the Electoral Management Body, yet it was such a body that was Constitutionally mandated to conduct elections. He disagreed with the submission made on behalf of the Petitioner to the effect that **Rule 2** of the **Election Petition Rules** was a directory rule rather than a mandatory one. He reiterated that there can be no competent petition where the successful candidate has not been enjoined as a party to the petition.

23. Mr. Abubakar for the 3rd Respondent submitted that the Petitioner had failed to show that he had a case that would entitle the court to invoke its jurisdiction to order a recount as demanded by the Petitioner. He reiterated that the Petitioner had no *locus standi* to demand for a recount because he was neither a candidate nor an agent of any of the candidates.

Issues for determination

24. There are two (2) broad issues that emerge for determination by this court:

Firstly, whether that the 3rd Respondent, as the person who was declared to have won the election in respect of the National Assembly seat of Lamu East constituency, is a necessary party to these proceedings; and

Secondly, whether, if the first issue is answered in the affirmative, the petition herein is incompetent by virtue of non-joinder of the 3rd Respondent as a party to these proceedings.

Determination of the Court

25. As regards the first issue for determination, it was the Petitioner's case that it was unnecessary to enjoin the 3rd Respondent as a party to these proceedings because he had no complaint against the 3rd Respondent. In his submission in opposition to the application to strike out the petition, the Petitioner stated that the only issue he was seeking to have determined by the court is in regard to the question whether, in light of the issues that arose during the counting and the tallying of the votes, this court should consider making an order of recount and or scrutiny of the cast ballots to determine the integrity of the results that were announced by the Returning Officer. In the Petitioner's opinion, such issue that has been placed for determination by the court did not require the 3rd Respondent to be a party to these proceedings. The Petitioner went ahead to categorically state that it would be in the interest of the 3rd Respondent to know the actual results of the elections for the Lamu East National Assembly Constituency seat because it would settle, the question, once and for all, who was indeed duly elected as the member of the National Assembly of the said constituency.

26. In response to this assertion by the Petitioner, the 3rd Respondent urged the court to find that any process that involves the determination of the validity of the election of the member of the National Assembly of Lamu East constituency required the person who is currently occupying the seat to be enjoined as a necessary party to such proceedings. In this regard, if the court were to make an order for recount and scrutiny of the cast ballots, and subsequently an adverse finding was made, then it is obvious

that the 3rd Respondent's position as the duly elected member of parliament of Lamu East constituency would be affected. The 3rd Respondent was supported on this position by the 1st and 2nd Respondents.

The applicable Law

27. The legal position regarding the procedure of filing election petition is provided for by **Article 87(2)** of the **Constitution**. It provides as follows:

“Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”

Article 105 of the **Constitution** provides as thus:

“(1) The High Court shall hear and determine any question whether –

(a) a person has been validly elected as a member of parliament; or

(b) the seat of a member has become vacant.

(2) A question under clause (1) shall be heard and determined within six months of the date of the lodging of the petition.

(3) Parliament shall enact legislation to give full effect to this

article.”

It is clear from the above articles of the **Constitution** that when an election court is hearing an election petition, the main issue that is there for resolution is the determination of the question whether *“a person has been validly elected”* in the seat whose election is being challenged in the election petition.

28. Pursuant to **Article 105(3)** of the **Constitution**, Parliament enacted the **Elections Act, 2011**. Under Section **75(3)**:

“In any proceedings brought under this section, a court may grant appropriate relief, including –

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.”

29. **Section 76(1)** of the **Elections Act** provides thus:

“A petition –

(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the elections in the Gazette and served within fifteen days of presentation;

(b)...”

Article 259 of the **Constitution** requires this court when interpreting the Constitution to give a purposive interpretation to the same so as to advance the values of the said Constitution. In the case of Election Petitions, the court should interpret the Constitution so as to give effect to the Constitutional demand that Election Petition be heard and determined efficiently, expeditiously and within the stipulated statutory period.

Analysis of facts and the Applicable Law

30. In the present application, it is clear that the petition filed by the Petitioner herein, ultimately challenges the validity of the election of the 3rd Respondent as the member of National Assembly of Lamu East Constituency. The **Constitution** and the **Election Act** recognizes that such petition would primarily be against the successful candidate and the electoral management body which conducted the elections, in this case the Independent Electoral and Boundaries Commission. **The Constitution** and the **Election Act** therefore anticipate that the successful candidate will be a necessary party to such proceedings. It will not do as the Petitioner wants to persuade this court to state that his petition is not against the 3rd Respondent but against the electoral management body. The primary object of any election petition is the nullification of the election of the successful candidate in the particular election. Such candidate is a mandatory party in the petition.

31. This position is reinforced by the **Elections (Parliamentary and County Elections) Petition Rules, 2013** which under **Rule 2** defines “Respondent” in relation to an election petition to mean the person whose election is complained of, the Returning Officer, the Commission and any other person whose conduct is complained of in relation to an election. It was not by accident or coincidence that the said Rules lists the person whose election is complained of as the first person who shall be a Respondent. The Petitioner argued that **Rule 2** should be interpreted so as to give it the meaning that the Petitioner had the choice of who he should sue as a Respondent. In his view, **Rule 2** did not mean or imply that all persons mentioned therein should be sued as Respondents. This court has considered the said argument. The submission would have had merit if it related to the Petitioner deciding whether or not to sue the Electoral Management Body with the Returning Officer or to sue one of them. This court is of the considered view that in any election petition, the Petitioner has no choice but to include the person whose election is complained of as one of the Respondents. Such person is a mandatory respondent. The argument advanced by the Petitioner to the effect that it is only the Commission under **Rule 9** of the **Election Petition Rules** which is a mandatory party to a petition does not therefore hold.

32. In the premises therefore, this court holds that a person whose election is being challenged in an election petition is a necessary and mandatory party to such election petition. The Petitioner had no choice but to include the 3rd Respondent as a party to the petition.

What are the consequences of the Petitioner’s failure to include the 3rd Respondent as a party to the petition?

33. In the first instance, the **Constitution** and the **Election Act** gives specific timelines within which certain acts ought to be done or undertaken in an election petition. It is a requirement that the petition must be filed within twenty eight (28) days from the date of the declaration of the results (See **Article 87(2)** of the **Constitution**). **Section 76(1)** of the **Election Act** makes it mandatory that once such petition has been filed, it should be served within fifteen (15) days of the presentation of the said petition in court. Although the Petitioner did not object to the 3rd Respondent being enjoined in these proceedings when the petition was listed for pre-trial conference, the inclusion of the 3rd Respondent into these proceedings was belated. It did not mean that the Petitioner had complied with the legal requirement that he enjoins the 3rd Respondent as a mandatory party to the petition. The Petitioner was required in law to enjoin the 3rd Respondent in the petition as a party in the first instance. He was required to serve him within fifteen (15) days of presentation of the petition in court. He did not do so.

34. It is clear from the foregoing that the competence of the petition has been brought into question by the non-inclusion of the 3rd Respondent in the initial petition as a party to the petition. The subsequent inclusion of the 3rd Respondent as a party to this petition does not cure the defect apparent in the petition. It is apparent that by the time the twenty eight (28) days statutory period expired, the 3rd Respondent who is a necessary party to these proceedings was not a party in this petition. This exclusion of the 3rd Respondent goes directly to the jurisdiction of this court to hear and determine this election petition on its merits.

35. This court is aware that in hearing this election petition it is exercising a special jurisdiction. The court must act strictly under the statutory regime that establishes the election court. As was recently held by Onyancha J in **Nairobi HC Election Petition No.4 of 2013 Amina Hassan Ahmed –Vs- Returning Officer Mandera County & 2 Others** (unreported):

*“A further reason why the provisions of the Elections Act and/or Rules must be complied with fully, is because the Act, and therefore the Rules, are a special legislation. They are a legislation for the purpose, as already stated above, of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result and any deficient compliance is likely to lead to delay and injustice and would likely be frowned upon by the court. I am accordingly guided by the comment of the Court of Appeal in the case of **THE SPEAKER OF THE NATIONAL ASSEMBLY –VS- KARUME, [2008] IKLR, 425** where the court stated thus:-*

“.....where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, the procedure should be followed.”

*Making a similar point while ruling on the nature or character of election petition legislation, the Supreme Court of India in the case of **JYOTI BASU & ORS –VS- DEBI GHOSAL & OTHERS** reported in AIR 1982 SC, 983, held that:-*

“.....An Election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket....(emphasis).”

*And finally, a similar position was taken by our Court of Appeal in the case of **JOHN MICHAEL NJENGA MUTUTHO –VS- JAYNE NJERI WANJIKU KIHARA & TWO OTHERS, Nakuru Court of Appeal, Civil Appeal No.102 of 2008,** at page 8,*

“Election petitions are special proceedings. They have detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is an issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues, not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all essentials of a petition, furnishing of particulars will not validate it.... If she (Petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.” “

36. I am in complete agreement with the above exposition of the law by Onyancha J. The election law regime is a complete set of laws by themselves and ought to be strictly complied with. Applying the same reasoning to the facts of this case, it is evident that where a person the validity of whose election is being challenged is not made a party to such election petition, then such petition is incompetent. It will not do for the Petitioner to argue that the complaint he has is only against the Electoral Commission and not the successful candidate. It will not matter whether the Petitioner considers the successful candidate as a busybody. The **Constitution**, the **Election Act** and the **Election Petition Rules** require that the successful candidate be made a party to the petition because such candidate is the primary target of such election petition. He is the one who will be the first person to suffer the consequences of the nullification of the particular election result. Where the Petitioner does not include the successful candidate as a party in the petition such petition lacks legal substratum and is liable to be struck out. For the court not to do so it will be engaging in an exercise in futility because any adverse finding affecting the successful candidate would mean that such occupant of the National Assembly seat would have been condemned unheard. This is a cardinal principle of the law which this court cannot breach.

The

Orders

37. In premises therefore, this court allows the 3rd Respondent’s application as a consequence of

which the court finds that the petition filed by the Petitioner is incurably defective. It is incompetent. This court exercises its jurisdiction under **Section 79(a)** of the **Elections Act** and hereby summarily rejects the petition. The petition does not meet the threshold of a petition which can be fixed for trial by this court.

38. The Respondents shall have the costs of this petition. This court invokes its jurisdiction under **Rule 36(1)(a)** of the **Election Petition Rules** and directs that the total amount of costs to be paid to the 1st and 2nd Respondents shall not exceed Kshs.600,000/- while the total costs payable to the 3rd Respondent shall not exceed Kshs.200,000/-.

39. It is so ordered.

DATED AT MALINDI THIS 29TH DAY OF MAY 2013.

L. KIMARU
JUDGE